

quoted and adopted the test applied by Dawson J in *Federal Commissioner of Taxation v Myer Emporium Ltd (No1)*,⁴ and stated that "...it seems to me difficult to argue that there is any real risk that it would not be possible to restore the applicants to their correct position in law if the appeal was successful".

Murray J refused the application for the stay of proceedings on the basis that it was not a case of an exceptional kind that required the Court to grant a stay of the proceedings pending the determination of the appeal.

DISCOVERY - NOT AVAILABLE WHEN WARDEN EXERCISING ADMINISTRATIVE FUNCTIONS – WARDEN ACTING ADMINISTRATIVELY WHEN MAKING RECOMMENDATION – INCLUDES APPLICATION FOR EXEMPTION, PLAINT FOR FORFEITURE *

Re Calder SM Ex Parte Robert Charles Gardner

(Full Court, Supreme Court of Western Australia, 21 May 1999)

The application before the Full Court was the return of an *order nisi* directed to a Warden who had declined to order discovery upon the application of an objector to an exemption application. The Court discharged the *order nisi* previously obtained by the objector.

Ipp J, with whom Pidgeon J concurred, held that the functions of a Warden under the "recommendatory provisions" of the Act (such as on a contested application for exemption under s102) were ministerial and administrative rather than judicial. Their Honours held that this is the case whether the Warden exercises those powers "in open court" under the Act or otherwise. The Court did not consider itself bound by *re Warden Burton SM; ex parte Roberts*⁵ because the argument addressed to the Court in that case was very limited.

Their Honours also held that the rules of natural justice did not entitle an objector to discovery.

They went on to hold (obiter) that when the Warden makes a recommendation to the Minister as to the forfeiture of mining tenements under s98 he is acting administratively. Further, whilst accepting that the matter is less than clear, the functions performed by the Warden under s96 in finally determining a plaintiff for forfeiture of a prospecting licence are also administrative.

4 (1986) 160 CLR 220 at 222-223.

* Neil Gentilli, Jackson McDonald, Perth.

5 (1997) 18 WAR 379 (1997 16 AMPLJ 203).

Ipp J respectfully disagreed with the reasons of Kennedy J in the Full Court in *Richmond v Panda Holdings Pty Ltd*⁶, in which Kennedy J held that by reason of the provisions of s132(1) a plaint for forfeiture under s96 in respect of a prospecting licence was heard in the Warden's Court, and went on to say "I do not accept that the phrase at the end of s132(1) "or relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon either the Warden's Court or the Warden" means that every time the Act confers power on a Warden to perform a function, the Warden is acting as a Warden's Court.

The decision is therefore strong obiter authority for the proposition that s136(1), which applies the rules of the Local Court to the Warden's Court, does not have any application to plaints for forfeiture or exemption applications concerning any type of mining tenement, and confirms the decisions of the Warden in *Greater Australian Gold and Linda Latham*⁷ and *Rodelinda Pty Ltd and Ian Geoffrey Burton*⁸

Wallwork J delivered separate reasons in which His Honour also concluded that the Warden was not sitting as a Warden's Court in dealing with the application for exemption and had rightly refused the application for discovery.

CORRECTION

In Recent Developments in Western Australia (1999) 18 AMPLJ 13, authorship of a casenote on *Ex Parte Haoma Mining NL v Tunza Holdings Pty Ltd and The Minister for Mines* was attributed to the wrong person. The correct authors were Edmund Babington and Matthew Smith, Gadens Lawyers, Perth. The error is regretted.

6 Supreme Court of Western Australia, Library No 980615).

7 (1988) 17 AMPLJ 100.

8 (1998) 17 AMPLJ 373